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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENVIRONMENTAL RESPONSE AND REMEDIATION; and KENT GRAY, Executive Secretary of the Utah Solid and Hazardous Waste Board, Plaintiffs and Appellees, vs. K. BRENT REDD, SHERRILL JEAN REDD, WOODY'S ENTERPRISES, LTD., BILL C. BUHLER, MARATHON OIL COMPANY and SHELL OIL COMPANY, Defendants and Appellants.	**REPLY BRIEF OF APPELLANT MARATHON OIL COMPANY** gray 2 Supreme Court No. 20010070 District Court No. 980700167 Oral Argument Priority No. 10

INTERLOCUTORY APPEAL FROM THE RULING OF THE SEVENTH DISTRICT COURT IN AND FOR SAN JUAN COUNTY, STATE OF UTAH THE HONORABLE BRYCE K. BRYNER, DISTRICT JUDGE, PRESIDING

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UTAH SUPREME COURT
DEC 19 2001
PAT BARTHOLOMEW
CLERK OF THE COURT

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SUMMARY OF ARGUMENT

In its Opposition Brief, the State of Utah ("State") makes numerous arguments that it should not be precluded from recovering its costs in connection with the cleanup of gasoline released at a former service station site in Monticello, Utah (the "Site"). Despite the State's plea, the issue of which party should pay cleanup costs for the Site is not before this Court. The only issue in this appeal remains: when did the State's cost allocation claim accrue under the Underground Storage Tank Act ("UST Act")?

In its opening brief, Marathon advocates two alternative statute of limitations rules that are both clear and fair. Under the first rule, the statute of limitations would begin to run when the State first incurred costs for investigation and cleanup of the Site. This rule is supported by the general rule in Utah that a cause of action accrues upon the last event necessary to complete a cause of action. Accordingly, a cost recovery claim accrues when the first costs are incurred.

The second and more directly applicable statute of limitations rule is based on a plain reading of the UST Act. Utah Code Ann. § 19-6-420(2). Under the plain language of the Act, the State's cause of action accrued upon the failure of Brent Redd to clean up the Site as required by the State. The State admits that it determined that Brent Redd had failed to clean up the Site in the Spring of 1993, well outside the applicable three year statute of limitations period. State's Brief at 7.

Both of these rules provide private parties and the State with a clear application of the statute of limitations and will further the public policy goals of timely site cleanups and timely-filed actions for cost allocation and recovery.

In contrast, the State characterizes its chameleon-like cause of action as whatever necessary to both excuse its late filing date and satisfy its need to collect past and future damages as stated in its First Amended Complaint. (¶ 33; R. at 121.) The State has attempted to accomplish this by bringing this action under the UST Act and then arguing before the trial court first that its claims were like tort claims (trespass/nuisance) and later like indemnity claims. Now, at this late date, in a final attempt to preserve its action, the State argues its claims should be analogized to restitution or quasi-contract.[1] There simply is no cause of action that meets these parameters. To accommodate the State's arguments would require the creation of an entirely new cause of action outside of the UST Act and in direct conflict with Utah law governing statutes of limitations and recovery under the UST Act as there is no cause of action under the UST Act or accrual principle under the statute of limitations that adequately supports the State's arguments.

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[1] It is a general rule under Utah law that even in cases applying de novo review, this Court will "review issues raised for the first time on appeal only if exceptional circumstances or plain error exists." Berenda v. Langford, 914 P.2d 45, 50 n. 1 (Utah 1996).

The State's arguments regarding equitable remedies have changed so frequently as to preclude Marathon from determining whether these same arguments were presented to the District Court or whether they are being raised on appeal for the first time.

If the District Court's decision is not reversed, there will be no means to prevent surprise litigation and the concordant unfair results from lack of witnesses, documents and other evidence that is lost with the passage of time. Under the current ruling, the statute of limitations does not begin to run until the state makes a cleanup cost payment. The District Court further ruled that "a new cause of action accrues upon each payment of cleanup costs." (R. at 816.) Applying the ruling, the State has unfettered discretion as to when the statute runs and could choose to let a claim lie dormant for an extended period of time without prejudice, despite having knowledge of all information necessary for its cause of action. Defendant petitions this Court to apply the statute of limitations consistent with the principles of Utah law by ruling that the State's claims are time barred.

ARGUMENT

I. THE STATE'S CLAIM ACCRUED EITHER (1) UPON THE STATE INCURRING COSTS OR (2) UPON THE FAILURE OF BRENT REDD TO CLEANUP THE SITE AS DEMANDED BY THE STATE IN 1993

A. The State's Claims are Time-Barred

The State's cause of action accrued either in early 1995 when it incurred costs by initiating cleanup activities or, under a plain reading of the UST Act, in 1993 upon Brent Redd's failure to cleanup the Site as the State required. Under Utah law, "as a general rule, a cause of action accrues when a plaintiff could have first filed and prosecuted an action to successful completion." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 843 (Utah 1996) (interpreting statute of limitations as applied to securities violations).

Indeed, the State's cause of action accrued upon the "happening of the last event necessary to complete the cause of action." Warren v. Provo City Corp., 838 P.2d 1125, 1128-29 (Utah 1992) (barring plaintiff's cause of action for failure to file claim within one year of event forming basis for cause of action). Despite the State's recent obfuscation of its claims by discussing equitable theories of recovery which the State argues only accrue with each payment of cleanup costs, the State is pursuing both past and future costs at the Site. Nothing has transpired since early 1995 that had any affect on the State's claim for past and future costs related to the Site. If the State's claim for all costs was ripe in 1998, it must also have been ripe in early in 1995.

Here, the undisputed facts show that the State could have first filed and prosecuted its action against Marathon as early as March 18, 1993, the date the State informed Brent Redd that his failure to cleanup the Site would result in his liability for all funds expended by the State in performing its own cleanup of the Site.[2] Moreover, this is not

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[2] Clearly, the State was well aware of its potential claims as early as 1980. The record evidence shows that the State first learned of releases of gasoline at the subject gas station (the "Site") in 1980. See Deposition of K. Brent Redd, ("Redd Depo."). (R. 902; Exhibit 24 at 1.) The State did an investigation and issued a report on the problem in 1981 which detailed its determination that no further action was immediately necessary, however, the report noted that additional cleanup may be required in the future. (See Redd Depo., R. 902; Exhibit 24 at 8.) The gas station closed down in 1991 and the State was also informed by the Southeastern Utah District Health Department that the tanks had leaked. (R. at 515, 542.) The State made repeated requests for Woody's Enterprises and Brent Redd, the Site's current and prior owners and operators, to clean up the Site. (R. at 521-40.) Woody's Enterprises and Brent Redd failed to do so despite the State's repeated requests and demands. (R. at 542-43.) By March 18, 1993, the State

the only potential accrual date for the State's cause of action—this event is highlighted because it demonstrates that the State was aware that it would need to sue Brent Redd for his failure to perform the required cleanup under the UST Act. Other potential accrual dates include: (1) Brent Redd's informing the State that he did not intend to cleanup the Site; (2) the State deciding to perform its own cleanup; (3) the State obtaining funding for the cleanup; (4) State contractors commencing cleanup at the site; (5) State contractors invoicing the State for cleanup at the site; (6) expenditure of State funds at the site; (7) State approval of contractor invoices for site cleanup; or (8) the State's first payment of contractor invoices. See Exhibit 1, Marathon's Opening Brief. The State has offered no specific arguments opposing any of the possible accrual dates listed in Exhibit 1. In fact, even giving the State the benefit of selecting the most charitable possible date, the State should have filed its action by June 21, 1998, three years after it paid the first contractor invoice for the Site clean up. The State, however, waited until September 16, 1998, well after the applicable three-year statute of limitations had expired under any accrual theory applicable to a cause of action allowing recovery for both past and future damages.

B. The State has Ignored Marathon's Plain Reading of the UST Act, under which the State's Claims are Time Barred after March 18, 1996

In its opening brief, Marathon extensively argues that the plain language of the Act establishes the date of Brent Redd's failure to clean up the site as an accrual date for

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determined that Brent Redd was unable or unwilling to take the abatement, investigative and corrective action required by the UST Act. (R. at 462.) The State began to clean up the Site with its own funds by early 1995. (R. at 553.)

the statute of limitations. Marathon's Opening Brief at 23-27. In fact, Marathon highlighted the argument by identifying it as one of the two most defensible accrual dates presented to this Court. Marathon's Opening Brief at 6. This was also one of Marathon's primary arguments to the lower court.

Remarkably, the State is entirely silent as to this argument. Under Marathon's analysis, and according to the State's own admission, the State advised Brent Redd that his "failure to comply with the UST Act would result in liability under the UST Act" on March 18, 1993. (R. at 542-544.) Therefore, under this analysis, the statute of limitations terminated the State's claims on March 18, 1996, more than two years prior to the State filing its complaint.

The plain reading of the UST Act provides an easily determined accrual date proximate to the time that gasoline leaks become known to the State and private parties. The advantages of such an interpretation of the statute of limitations are two-fold. First, prompt action will be taken when gasoline leaks are detected. Second, there is no need to reach complex issues regarding whether every payment is its own cause of action and whether the State can file a claim for causes of action that have not yet accrued.

II. IN ITS COMPLAINT, THE STATE HAS CHOSEN RELIEF INCOMPATIBLE WITH ITS CURRENT ARGUMENTS

This Court can look to the language of a Complaint to determine the nature of a lawsuit. See e.g. Parker v. Rolfson, 525 P.2d 612 (Utah 1974).

On September 16, 1998, the State filed its Complaint. That Complaint contained one cause of action, which sought damages only under the UST Act. (R. at 1-7.) In May, 1999, the State filed an Amended Complaint (R. at 115-123.) which again sought damages only under the UST Act.

A. The State Seeks Future Damages

In both its Complaint and its Amended Complaint, the State seeks past and future damages. (R. at 121.) The State's decision to seek future damages is incompatible with its primary argument and demonstrates the trial court's error.

In order to seek future damages, the State must acknowledge that their statutory cause of action is ripe and that all the elements of their claim are present. Yet, its primary argument to preserve its claims is that each "cost" is its own cause of action and is not ripe until it is actually spent. Thus, in order for the Court to grant the future relief that the State seeks, the Court must apply the accrual theory that Marathon advocates, that all costs accrue on the date that the State first incurred costs.

B. The State Did Not Plead Equitable Indemnity, Quasi-Contract, Restitution or any Other Equitable Relief

Neither the Complaint nor the Amended Complaint includes a cause of action or seeks damages for indemnification, trespass, nuisance, restitution or quasi-contract. Regardless of this fact, the State makes extensive use of cases based on these causes of action. The State analogizes its claim under the UST Act to common law claims based upon these theories to such an extent it is difficult to recognize the State's statutory claim

as it was set forth in the Amended Complaint. The State cannot survive the statute of limitations by simply recharacterizing what is expressly pled in both its Complaint and Amended Complaint. A plaintiff is not permitted to recharacterize its claims to avoid the bar of the statute of limitations. See DOIT, Inc., 926 P.2d at 842 n. 13 (citing Malone v. University of Kansas Medical Ctr., 552 P.2d 885, 889 (Kan. 1976)).

III. THE STATE IS BOUND BY STATUTES OF LIMITATIONS JUST AS ANY OTHER PRIVATE PARTY—THERE IS NO BASIS FOR DISTINGUISHING THE STATE'S CLAIM FROM PRIVATE PARTY COST RECOVERY ACTIONS

The State admits that it is bound to the three-year statute of limitation applicable to cost-allocation actions under the UST Act. State's Brief at 3. However, the State argues that the date upon which the three year statute accrues should be determined differently than the date for a private party because the State, unlike a private party, has no property interest in the Site. Remarkably, the State provides no support for its assertion.

The State alleges that it deserves special treatment[3] because it is entitled to bring a statutory cost recovery action, whereas all other parties are limited to an action for

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[3] In direct contrast to the State's claim that it deserves a special accrual date under the Utah Statute of Limitations, the Minnesota District Court treated the State of Minnesota the same as a private party and, as a result, barred all of its claims related to pollution at a privately owned site. Minnesota v. Employers Ins. Co., No. MC 00-001819, slip op. at 6-7 (Sept. 5, 2001) (attached as Exhibit A). The court relied on Union Pacific R. Co. v. Reilly Industries, Inc., F.Supp. 2d 860 (D. Minn. 1998) aff'd, 215 F.3d 830 (8th Cir. 2000), and granted summary judgment for defendants on the grounds that the State of Minnesota was aware of contamination at the subject sites outside of the applicable statute of limitations period. The court made no special exceptions or distinctions

contribution. Notwithstanding the State's failure to provide any legal authority that the difference between a cost recovery right and a contribution right is of any moment, the State's bald statement actually supports Marathon's statute of limitations arguments. As the State has highlighted in the UST Act, a private party may pursue a contribution claim for costs incurred in excess of its liability. See Utah Code Ann. § 19-6-424.5(6)(a). However, claim for contribution cannot be brought until a private party is required to pay costs in excess of its liability. Therefore, if the State waits eight years or more to initiate a proceeding wherein the liability of the parties is determined, any claim for contribution will be correspondingly delayed.

This problem is further exacerbated by the potential for additional litigation as the State seeks to recover costs incurred after the initial lawsuit—consistent with the District Court's ruling that the State has a new cause of action each time it pays for cleanup at the Site. Accordingly, the State is in a much better position than any private party to pursue its claims and its cause of action actually accrues earlier, as all private contribution

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between the State of Minnesota and any private party with a property interest in the site. The court held that the remedies available were similar in nature to statutory and common law remedies for damage to real property. Accordingly, the cause of action accrued upon discovery of contamination on the property, regardless of whether it was the government or a private party seeking cost recovery.

This decision is persuasive in that the UST Act is very similar to the Minnesota statute. Marathon provided an extensive analysis of Union Pacific R. Co. in its opening brief and highlighted the similarities of the cost recovery provisions of the UST Act and the Minnesota cleanup statute. Marathon's Opening Brief at 16-17.

actions are contingent on the State's claims.[4] Delay by the State could push contribution actions so far into the future that little evidence would be available for allocation of cleanup costs in a contribution action.

IV. THE STATE SEEKS TO PRESERVE ITS CLAIM BY EXTENDING INDEFINITELY THE STATUTE OF LIMITATIONS USING CONFLICTING LEGAL THEORIES THAT ARE INCONSISTENT WITH UTAH LAW AND UNRELATED TO THE ISSUE PRESENTED IN THIS CASE

The State has cobbled together a mix of equitable theories in an effort to preserve its claim under the only theory available—that each payment of response costs by the State constitutes a new cause of action. There is no single legal theory that supports the State's argument. Rather, the State has blended various legal doctrines and attempted to support its legal theory that it has a new cause of action with each payment. A review of these arguments demonstrates their inapplicability.

A. The State's Claim is Based in Law, Not Equity and Therefore is not Exempt from the Statute of Limitations Based on Equitable Theories of Recovery

The State erroneously asserts that its claim is based on the equitable principles of restitution and indemnity, arguing that a new cause of action arises with each new

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[4] The State's assertion that private party contribution actions should be treated differently than government cost recovery actions for statute of limitations purposes also creates potentially disparate results. If one party pays greater than its share of liability, it could be time barred from recovery of costs in excess of its liability, while the State is not.

payment of costs related to the Site. However, when the State drafted its complaint, it chose to pursue a statutory claim that is based entirely on law, not equity. (R. at 120-21.)

Additionally, this Court has consistently refused to apply equitable principles to actions based on statute. See Career Serv. Review Bd. v. Utah Dep't of Corrections, 942 P.2d 933, 940-41 (Utah 1997) (holding that equitable defenses do not apply to an action brought under statutory authority of the Utah Administrative Procedure Act to enforce an administrative order); DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 845-46 (Utah 1996) (distinguishing cases where the plaintiff seeks equitable relief from claims based in law and holding that the application of the equitable doctrine of laches is incorrect). If equitable defenses are not applicable to claims based in law, it is equally inappropriate to allow the resurrection of stale statutory claims on equitable grounds when they are otherwise barred by the statute of limitations.

B. Even if the State was Entitled to Recovery Under a Quasi-Contractual Theory, Its Claim Would still be Time-Barred under Utah Law

Even assuming arguendo that cost allocation and recovery actions are founded on principles of contract, this Court has held that claims under a contract ordinarily accrue at the time of breach. Upland Indus. Corp. v. Pacific Gamble Robinson Co., 684 P.2d 638, 643 (Utah 1984). Claims based on quasi-contract are subject to the same statute of limitations principles as oral contracts. See CIG Exploration, Inc. v. Hill, 824 F. Supp. 1532, 1546 (D. Utah 1993) (citing Petty & Riddle, Inc. v. Lunt, 138 P.2d 648, 650 (Utah 1942). "The plaintiff cannot ask the law to make and impose a contract and then seek to

avoid the applicable statutory bars." T&S Investment Co. v. Coury, 593 P.2d 503, 505 (Okla. 1979) (holding that quasi-contractual cause of action was time barred by statute of limitations applicable to express or implied contracts).

The breach in this case occurred as soon as the State determined that Brent Redd and Woody's Enterprises were unable or unwilling to cleanup the property under the UST Act. All subsequent actions taken by the State, as well as the costs that the State has incurred, are all related to damages but do not provide any additional facts necessary for the State's claim based on the breach of contractual or quasi-contractual obligations to clean up the Site. Any claim by the State that such a cause of action does not accrue until the cleanup is paid for is meritless. This Court has recognized in some contract cases, although damages may not be measurable until several years after the purported breach, a plaintiff can still be required to file a timely suit with respect to the breach and then request the trial court to stay proceedings pending the solidification of damages. See S & G Inc. v. Intermountain Power Agency, 913 P.2d 735, 741 n.6 (Utah 1996). Additionally, the State's ability to sue for future response costs has not proven to be a problem in other environmental cases. See Utah Dept. of Envtl. Quality v. Wind River Petroleum, 881 P.2d 869, 875 (Utah 1999) (allowing costs to accrue during course of litigation).

Thus, even under the State's misplaced notion that there may be a quasi-contract in this case, the State should have filed this action within three years of when it believed

Brent Redd breached the obligation by failing to cleanup the Site. Prompt filing in this manner would have allowed the parties to discuss alternative cleanup plans prior to initiation of cleanup by the State and, if necessary, discovery could have been conducted when witnesses were alive, memories were fresher and documents were available.

C. The State's Equitable Indemnity Argument Does Not Apply Because the State is Not Seeking Reimbursement for a Separate Underlying Liability

The State's effort to characterize its claim as a common law indemnity action is equally misplaced for a variety of reasons. First, there is no separate underlying claim involving an unrelated third party as exists in indemnity actions. Second, there has been no delay while the State's liability to a third party was determined, for which the State would ultimately seek reimbursement from Marathon. Third, there is no party which is legally obligated to pay for the damages suffered by a victim whose injuries are entirely attributable to the wrongdoing of a third party tortfeasor.

In Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984), this Court set forth the elements required in an indemnity action under Utah law,

> In actions for indemnity, courts universally require proof of three elements: (1) the payor (prospective indemnitee) must discharge a legal obligation the payor owes to a third person; (2) the prospective indemnitor must also be liable to the third person; and (3) as between the claimant payor and the prospective indemnitor, the obligation ought to be discharged by the indemnitor.

Perry, 681 P.2d at 218 (rejecting indemnification action brought by subcontractor against supplier after subcontractor was sued by general contractor) (citing Ore-Ida Foods, Inc. v.

Indian Head Cattle Co., 627 P.2d 469, 475 (Or. 1981); see also, Salt Lake City School District v. Galbraith & Green, Inc., 740 P.2d 284, 287 (Utah Ct. App. 1987) (holding that employer was entitled to indemnification from insurance advisor for amounts paid in settlement of claim based on insurance advisor's malpractice). A simple comparison of these elements to the State's claim against Marathon shows that an indemnitor—indemnitee relationship does not exist. The three fundamental differences between a common law indemnity action and the State's action for cost allocation pursuant to the UST Act follow in detail.

First, the State has not discharged a legal obligation on behalf of Marathon that it owed to a third person. See Perry, 681 P.2d at 218. Under the UST Act, the State itself, rather than a third party as exists in an indemnity case, has complete discretion in determining the costs and timing of both the underlying cleanup and the cost allocation action. This discretion as to the type of remedy and thus the amount of expenses incurred is not indicative of indemnity actions. In the instant case, the State was informed of a petroleum leak from a tank and seven years later it elected to clean up the Site and attempt to recover and allocate costs under the UST Act. Thus, the cause of action for reimbursement upon violation of the UST Act does not reflect the two-part process of the indemnity scenario. If the State can avoid the statute of limitations by masquerading its claim as a common law indemnification, it appears that almost any type of claim, based

in tort, contract, or statute can make an end run around the statute of limitations using a similar argument.

Second, the action for common law indemnity is an equitable remedy "wholly distinct from the underlying [cause of] action which gave rise to the right of indemnity." Davidson Lumber Sales, Inc. v. Bonneville Inv. Inc., 794 P.2d 11, 19 (Utah 1990). Therefore, "[a] common-law indemnity action does not arise when the underlying damage occurs; rather, a it runs from the time of the payment of the underlying claim or the payment of a judgment or a settlement." Id. In this case, however, the State's reimbursement claim under the UST Act is inextricably intertwined with the underlying claim of liability. This is because it is all part of the same cause of action and forms the basis for the State's claim.

Third, the State was under no legal obligation to incur cleanup costs and had an alternative administrative remedy readily available. If the State decided to do nothing at the Site it would not be liable to any party for conditions at the Site. The State could have ordered the Site owner to cleanup the Site pursuant to Utah Code Ann. § 19-6-420(2). Instead, the State chose to cleanup the Site itself. Moreover, the State's control over the timing and nature of this cause of action is underscored by the fact that it could have tolled the statute of limitations by simply ordering the Site owner to perform the cleanup and initiating an enforcement proceeding if the Site owner failed to perform the cleanup. See Utah Code Ann. § 19-1-305 (1991).

In sum, the differences between the State's cause of action and the elements of an action for equitable indemnification are numerous and significant.

D. The State's Attempt to Analogize its Claim to Equitable Reimbursement is Misplaced

In its attempt to find an alternate theory that preserves its claim, the State argues that an action for equitable reimbursement or equitable restitution accrues "when the claimed overpayment is made." State's Brief at 18. This argument is unhelpful in deciding the issue before this Court. Equitable restitution or reimbursement requires that a defendant give back money that it had received from a plaintiff. See CIG Exploration, Inc. v. Utah, 2001 UT 37, 24 P.3d 966 (applying equitable reimbursement to overpayment of royalties); Morris v. Sykes, 624 P.2d 681 (Utah 1981) (applying restitution to forfeiture of payments for purchase of land).

Here, the State's claim is based upon the cleanup of gasoline released from storage tanks. In equitable reimbursement cases the entire cause of action is based upon the prior payment of money from one party to another, rather than the costs associated with paying third parties to address a separate injury. Marathon has not received any money from the State. Therefore, the State does not have a claim for equitable reimbursement. Accordingly, cases based on equitable reimbursement or restitution are inapplicable to the issue before this Court.

E. The State's First Amended Complaint Expressly Seeks to Recover Costs from the PST Fund, which are Subrogated According to the UST Act, Placing the State in the Same Position as a Private Party

In its opening brief, Marathon argues that the notion of subrogation applies because of the manner in which the State pled its case. In its brief, the State's only argument that its cost recovery claim is not rooted in subrogation is that the State is not seeking cost recovery for a release covered under the PST Fund. State's Brief at 20. The State is incorrect.

In paragraph 30 of the State's First Amended Complaint, as pointed out in Marathon's opening brief (and to the District Court below), the State seeks "funds from the Petroleum Storage Tank ("PST") Fund which was created by Utah Code Ann. § 19-6-409." (R. at 120.) The UST Act expressly states that "if any payment is made under this part, the [Petroleum Storage Tank Trust] fund shall be subrogated to all the responsible parties' rights of recovery against any person or organization . . ." Utah Code Ann. § 19-6-426(7) (1988). This statute places the State in the shoes of a private party seeking to recover costs incurred cleaning up the Site. Thus, the State is subject to the same statute of limitations principles as any other private party.

V. THE STATE RELIES UPON FEDERAL CASES WHICH DO NOT APPLY

A. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") Cases Are Inapplicable

The State's reliance on CERCLA case law is misplaced. As the State has noted in its brief, the UST Act is a federally delegated program that is part of the Resource

Conservation and Recovery Act ("RCRA"). See 42 U.S.C. § 6991a. RCRA is fundamentally different than CERCLA in its scope and purpose. "RCRA is a comprehensive statute that governs the treatment, storage, and disposal of solid and hazardous waste. Unlike [CERCLA], RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996). CERCLA contains very detailed liability provisions and statutes of limitations restrictions.[5] These provisions provide explicit details on when a cause of action accrues

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[5] CERCLA's statute of limitations provisions are as follows:

> (2) Actions for recovery of costs
>
> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—
>
> (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.
>
> In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all

and the applicable statute of limitations in each case. These provisions are inapplicable to cases not filed under CERCLA.

If UST Act claims are meant to follow the same statutes of limitations accrual principles as CERCLA claims, such language could have easily been included in RCRA or the UST Act. No such language exists. The mere fact that both statutes relate to environmental matters and contain cleanup provisions does not justify distorting an action based on a RCRA delegated statute to fit CERCLA case law.

B. The Federal Water Pollution Control Act Cases Are Inapplicable

In its continuing attempt to avoid the statute of limitations by characterizing its claim as equitable relief, the State improperly relies on several Federal Water Pollution Control Act ("Clean Water Act") cases. Notwithstanding the fact that this Court has expressly rejected imposing equitable principles on claims based in law, these cases are inapplicable to the question before this Court.

Two of the cases relied upon by the State are based solely on equitable restitution because there was no statutory basis for cost recovery. In Wyandotte Trans. Co. v. United States, 389 U.S. 191, 204-05 (1967) the Supreme Court held that the United States had an equitable right of restitution for costs associated with removing sunken vessels.

> response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

42 U.S.C. § 9613(g)(2).

The Clean Water Act provided the United States with authority to remove sunken vessels from navigable waters, however, it did not provide a means of cost recovery within the statute.[6] Likewise, in United States v. Boyd, 520 F.2d 642, 644-45 (6th Cir. 1975), the court held that the United States could pursue cost recovery under a theory of restitution to recover its costs for removing a sunken barge.

The application of equitable principles in these cases was necessitated only by the lack of statutory cost recovery authority under the applicable sections of the Clean Water Act. However, the State is not in such a situation. The UST Act provides a clear statutory basis for cost recovery and Utah law does not blend equitable principles with actions based in law. Career Serv. Review Bd., 942 P.2d at 940-41. The State's arguments that its statutory cause of action is based on equitable principles and should therefore be treated as a restitution claim because the State is authorized to perform cleanup work and recover its costs ignore Utah law. Accordingly, it would not be necessary or correct to base the State's statutory cost allocation claim on equitable restitution grounds and allow the State to avoid any practical limits how late it in can file an action.

The remaining Clean Water Act cases are based on a cost recovery statute. These cost recovery actions were brought by the United States for recovery of response costs for

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[6] The Clean Water Act was subsequently amended in 1986 to add a cost recovery component to 33 U.S.C. § 414. See Water Resources Development Act of 1986, Pub. L. No. 99-662, § 939, 100 Stat. 4082, 4199 (33 U.S.C. § § 414 and 415).

the short-term cleanup of oil spills. See United States v. P/B STCO 213, 756 F.2d 364 (5th Cir. 1985) (deciding whether statute of limitations prevented recovery of costs relating to response actions for three different oil spills which were performed between October 31, 1977 and November 9, 1977; January 28, 1979 and February 3, 1979; and September 26, 19776 and October 7, 1976 respectively); and United States v. Dae Rim Fishery Co., Ltd., 794 F.2d 1392 (9th Cir. 1985) (deciding whether cleanup costs for response actions performed between March 8 and March 20, 1981 were time barred). These cases are factually inapplicable for a number of reasons.

First, the Clean Water Act cases deal with cleanups of oil spills that were completely cleaned up within a matter of days or weeks immediately after the oil was spilled. In the State's case, actual cleanup at the Site was not initiated by the State until over 8 years after the gasoline was reported to have leaked out of the tanks.[7] After two years of sporadic cleanup efforts the end of the cleanup at the Site is still not in sight. Accordingly, the quasi-contract theory used in the Clean Water Act cases does not apply to the State's claim under the UST Act because the claim would not have even accrued yet.

Second, recovery under the theory of quasi-contract is only possible under the Clean Water Act if the cleanup is already completed. "[T]he cause of action for

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[7] As the Record indicates, the state was actually aware of gasoline leaks at the Site since 1980. (R. 902; Exhibit 24 at 1.)

recouping expenses under the [Clean Water Act] does not accrue until the government completes its clean-up operations." Dae Rim Fishery, 794 F.2d at 1395. The State has chosen to file the cost recovery claim long before cleanup was complete, yet the State now seeks to avoid the statute of limitations under case law that clearly states that the State's cause of action is still premature. It appears that the State's chosen remedy in this case does not match the case law it is using as a foundation for its cause of action.

Finally, the use of a quasi-contract theory of recovery in the Clean Water Act cases makes more sense in the federal context considering the lack of a federal statute of limitations for actions based on statute. See 28 U.S.C. §§ 2415(a) & (b). If the government's claims under the Clean Water Act were not characterized as quasi-contractual, there would be no statute of limitations whatsoever. This type of analysis is not necessary in Utah, however, as Utah has a clear statute of limitations for "liability created by the statutes of this state . . ." Utah Code Ann. § 78-R-26(4). Therefore, there is no need to distort the State's claim to make it into a contractual cause of action.

CONCLUSION

Based upon the arguments set forth above, Marathon respectfully requests that this Court apply the statute of limitations in a manner consistent with the principles of Utah law and rule that the State's claims are time barred.

DATED this 19th day of December, 2001.

DAVID W. TUNDERMANN
J. MICHAEL BAILEY
RICHARD J. ANGELL
PARSONS BEHLE & LATIMER
Attorneys for Marathon Oil Company

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2001, I caused to be mailed via first class mail, two true and correct copies of **REPLY BRIEF OF APPELLANT MARATHON OIL COMPANY,** to the following:

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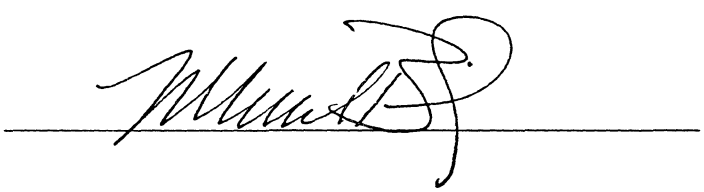

Tab A

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA, by its Attorney General, MIKE HATCH — COURT FILE NO. MC 00-001819

Plaintiff,

vs.

EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY, HOME INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY, AND TRAVELERS INDEMNITY COMPANY,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the undersigned, Judge Daniel H. Mabley, on July 17, 2001, pursuant to various Defendants' Motions for Summary Judgment. Defendants participating in this motion are Travelers Casualty and Surety Company, Travelers Indemnity Company, Employers Insurance of Wausau, Home Insurance Company and Liberty Mutual Insurance Company. Andrew S. Amer, Simpson Thacher & Bartlett, New York, New York, appeared on behalf of the Defendants. Joanne B. Grossman, Covington & Burling, Washington D.C., appeared on behalf of Plaintiff State of Minnesota. Based upon the pleadings, files, records, memoranda, affidavits and proceedings herein, IT IS HEREBY ORDERED:

1. That the Defendants' Motion for Summary Judgment is GRANTED.
2. That the State's Fourth Amended Complaint is dismissed with prejudice.
3. That the attached memorandum of law is hereby incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: September 5, 2001

David H. Mabley
Judge of the District Court

MEMORANDUM

Introduction

The Defendants' motion involves a challenge to this action on the grounds that the State's claims are barred by the applicable statute of limitations. Specifically, the Defendants argue that the State's claims regarding the pollution at the East Bethel and Oak Grove landfill sites were time barred by the former version of the Minnesota Environmental Response and Liability Act (MERLA) statute of limitations, Minn. Stat. § 115B.11, in 1988 and 1990, respectively. They further argue that the State's claims were not revived by the amendments made to Section 115B.11 by the Minnesota legislature in 1998. For the reasons set forth below, this Court agrees.

Statement of Undisputed Facts

1. In 1982, the State had knowledge that volatile organic compounds (VOC's) were detected above background levels in the groundwater in the vicinity of the East Bethel landfill.
2. In 1984 the State had knowledge that VOC's were detected above background levels in the groundwater and wetlands in the vicinity of the Oak Grove landfill.
3. In 1988, 6 years had elapsed since the State discovered VOC's above background levels in the groundwater in the vicinity of the East Bethel landfill.
4. In 1990, 6 years had elapsed since the State discovered VOC's above background levels in the groundwater in the vicinity of the Oak Grove landfill.
5. The State filed this single cause of action against Defendants under Minn. Stat. § 115B.444 on or about February 4, 2000, 18 years after VOC's were discovered at East Bethel and 16 years after VOC's were discovered at Oak Grove.

MEALEY'S LITIGATION REPORT Insurance

Legal Analysis

1. Summary Judgment

To prevail on a motion for summary judgment, the moving party must show that there is no genuine issue as to any material fact. Minn. R. Civ. P. 56.03. A claim must be dismissed if "there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). When the material facts surrounding a statute of limitations question are not in dispute, as here, the court is presented with a question of law where the sole issue is one of statutory interpretation. *Hermann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). The Court finds that there is no issue as to any material fact that the State's claims with regard to East Bethel and Oak Grove are barred by the applicable statute of limitations.

2. Expiration of the State's claims under previous version of Minn. Stat. § 115B.11.

This action stems generally from MERLA, Minn. Stat. § 115.01 *et seq.* Specifically at issue in this motion is the previous version of Section 115B.11, the applicable statute of limitations. Prior to the 1998 amendments, Section 115B.11, subdivision 1, provided that "no person may recover pursuant to sections 115B.01 to 115B.15 unless the action is commenced within six years from the date when the cause of action accrues." *See* Minn. Stat. § 115B.11 (1997). Unfortunately, the statute did not specify or clarify when a cost recovery action such as this one "accrued." While the statute did, however, provide guidance for determining the accrual date in cases of death, personal injury or disease, such guidance is irrelevant, of course, because this case is a cost recovery action and does not involve death, personal injury or disease.

In the face of the legislature's silence, Minnesota case law provides guidance. Under Minnesota law, a cause of action "accrues" when "the holder of the right can apply to the court for relief and is enabled to commence proceedings to enforce its rights." *Jacobsen v. Board of Trs. Of the Teachers Ret. Ass'n*, 627 N.W.2d 106, 110 (Minn. Ct. App. 2001) (citing *Everett v. O'Leary*, 90 Minn. 154, 157, 95 N.W. 901, 902-03 (1903)). Implicit in this definition is a recognition that the accrual date differs according to case type. It is also a fundamental principle of Minnesota common law that a cause of action accrues when some damage occurs, irrespective of whether the final or ultimate damages are known or predictable. *See Dalton v. Dow Chemical*, 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968). It is not necessary that the entire loss or damage be known. *Id.*

In *Union Pacific R. Co. v. Reilly Industries, Inc.*, 4 F. Supp. 2d 860 (D. Minn. 1998), the Federal District Court considered the accrual standard issue for MERLA cost recovery actions. The court in *Union Pacific* reviewed the two lines of authority on this issue: one that supported the common law "discovery" rule and the other that supported the date when response costs were incurred. *Id.* at 864-65. After considering these arguments, the court cited three main reasons in holding that a cost recovery action under MERLA accrues when the pollution or contamination is discovered.

First, it noted that the "MERLA cleanup requirement did not expand the common law remedy for pollution of property" and that the cost recovery action provided for under MERLA was similar to a long-recognized measure of damages in common law pollution cases. *Id.* at 865 (citing *Minnesota Mining and Mfg. v. Travelers Indem. Co.*, 457 N.W.2d 175, 183 (Minn. 1990)). In doing so, the Court essentially equated a MERLA cost recovery action with a common law tort action for damage to real property. Thus, it applied the same accrual standard – i.e., the discovery rule. Second, it cited the Minnesota Court of Appeals decision in *Halstad Development Corp. v. Browning Ferris Industries*, C5-94-2241, 1995 WL 254385 (Minn. Ct. App. May 2, 1995). *Id.* at 865. The Court of Appeals in *Halstad Development* held that the same accrual standard (date of discovery) applied for both common law tort claims and MERLA claims. Third, it noted that MERLA does not limit parties to liability for costs previously incurred. In fact, a party may sue for response costs under MERLA before any such costs are incurred at all. *Id.* at 865 (citing *State of Minnesota v. Kalman W. Abrams, Inc. et al.*, Civ. No. 4-96-CV-3, slip op. (D. Minn. August 22, 1997))[1]; *see also* Minn. Stat. § 115B.04, subd. 1. Thus, in citing these factors, the Federal District Court held that MERLA cost recovery actions accrue on the date the pollution is discovered.

The Eighth Circuit Court of Appeals subsequently affirmed the District Court opinion. *See Union Pacific R. Co. v. Reilly Industries, Inc.*, 215 F.3d 830 (8th Cir. 2000). In doing so, the Eighth Circuit Court specifically noted the District Court's reasoning that the MERLA remedies were similar in nature to the old statutory and common law remedies for damage to real property. *Id.* at 840-41.[2]

With this motion, the Court is presented with arguments similar to those presented to the Federal District Court in the first *Union Pacific* case. Defendants argue that the accrual standard for cost recovery actions under the former version of MERLA should be the date of discovery. In doing so, it argues that the date when construction of a response action is initiated (as in the 1998 amendments) and the date when remedial costs are incurred (as in Massachusetts and Arizona

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[1] *See also State of Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1026 (8th Cir. 1998). On appeal, the 8th Circuit Court of Appeals declined to address all issues but the issue of the accrual standard for MERLA cost recovery actions.

[2] Despite the clear and unequivocal decisions on the accrual issue by the Federal District Court and the Eighth Circuit Court of Appeals, this Court has reservations about the conclusions reached by these Courts. This Court believes that it would be much fairer for the accrual date for cost recovery actions to be the date when construction of a response action is initiated. The Court believes this would more accurately reflect the nature of MERLA cost recovery actions as opposed to the nature of actions stemming from personal injury, death or disease. Despite these reservations, the Court believes the decisions on this issue by the Federal District Court and the Eight Circuit Court of Appeals as well as the other cited precedent should be followed in this case.

under similar law and rejected in the first *Union Pacific* case[7] are not the appropriate accrual dates.[8] Based upon the case law cited above, the Court holds that the applicable accrual standard in MERLA cost recovery actions is the date of discovery. As such, the State's claims for recovery of costs under MERLA regarding East Bethel and Oak Grove are time barred by Section 115B.11 as it was written prior to the 1998 amendments.[9]

3. *Effect of 1998 Amendments to Section 115B.11*

The Defendants argue that because the State's claims regarding East Bethel and Oak Grove were time-barred by 1988 and 1990, respectively, such claims would need to be specifically revived by the Minnesota legislature for them to be valid. The State, in addition to arguing that these claims were never time barred, argues that the 1998 amendments to Minn. Stat. § 115B.11 would be superfluous if the State's claims regarding pollution at East Bethel and Oak Grove were time-barred. The Court agrees with Defendants. For the State's claims to be valid, the 1998 amendments would had to have revived the State's already time-barred claims with regard to East Bethel and Oak Grove. For two reasons, the 1998 amendments to Section 115B.11 did not do so.

First, the language within the 1998 amendments relied upon by the State relates only to <u>retroactive</u> application of the statute of limitations, not <u>revival</u> of previously expired claims.

Implicit in the 1998 Amendments is a requirement that the "action" must not have previously expired under the former version of the statute. Most importantly, though, the 1998 Amendments are completely silent as to claims that may be time-barred under the former version of the statute. In the absence of such specific language regarding previously expired claims, the Court may not infer a legislative intent to revive claims previously expired.[10] *See Gomon v. Northland Family Phys. Ltd.*, 625 N.W.2d 496 (Minn. Ct. App. 2001).

Second, the Minnesota legislature failed to follow its normal procedure for enacting statutes of limitation that revive previously expired claims. Historically, a revival statute specifically refers to claims that are or will be expired by using specific terms such as "revives" or "revived." Also, a revival statute typically refers to a date before which the time barred must be filed. The 1998 Amendments to Section 115B.11 do not include any such language. The Minnesota Legislature clearly knows how to enact a revival statute. *See e.g.* Minn. Stat. § 541.22. As such, the language within Section 115B.11 referring to retroactive application is irrelevant and does not revive the State's claims regarding East Bethel and Oak Grove that are expired.

<u>Conclusion</u>

The Court finds that the State's claims with regard to pollution at East Bethel and Oak Grove were time barred in 1988 and 1990, respectively, under the original version of Section 115B.11. Neither the legislature's tolling of the MERLA statute of limitation in 1994, the 1998 amendments nor the structure and purpose of MERLA change this fact. Furthermore, the 1998 amendments do not effectuate a revival of any claims that were time-barred before the statute of limitations was tolled by the legislature in 1994. For these reasons, the State's Fourth Amended Complaint must be dismissed.

DHM

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re Oak Rhodes Road Area Investors v. Factory Co., 843 F. Supp. 571 (D. Minn. 1994); *Schlemp v. Anoka Elec. Cooperative Corp.*, 582 Ann. 187, 494 P.2d 1338 (App. 1993).

[8] The State argues that the legislature's silence regarding the accrual standard for MERLA cost recovery actions means that the State's cause of action never accrued in the absence of interpretation of the statute of limitation by a court. This Court disagrees and finds that the legislative silence on the issue is wholly irrelevant and that, as explained above, there is a body of relevant case law holding that the discovery rule is the proper accrual standard for cost recovery actions under MERLA.

[9] The Court notes that the State, according to its response to Defendant Commercial Union's First Set of Interrogatories and Document Requests, not only discovered the pollution at East Bethel in 1987 but also began full investigation of that site that year. Similarly, in its response to the same interrogatories and document requests, the State admitted to discovering the pollution at Oak Grove in 1986 and beginning remedial activities there later that year. It appears that even under the current version of the MERLA Statute of Limitations, Section 115B.11 – as based on CERCLA – the State may not have timely filed its claims in this action.

[10] Additionally, the legislative history indicates that the silence in the 1998 Amendments regarding previously expired claims was intentional. On March 23, 1998, the day the Amendments were enacted into law, the following exchange took place on the floor of the Minnesota legislature. REP. W. LEAVER: "[W]hen we were in committee you heard me ask the PCA if there was any intent to reprosecute claims that they have already passed or that they are not pursuing now. I was assuming that that's still the position – even with this language, is still the position of the PCA, or do they don't intend to go out and reopen a bunch of forgotten or potential forgotten sites that's already passed by?" SPEAKER: "Representative Long." REP. LONG: "I don't see it in any way that that is the intent, and I don't think the language would imply that. Certainly they intend to have a more cooperative relationship with the business community."

Transcript, Bill Passage – House of Representatives, 81st Day of 81st Session, 3/23/98, House File Number 3277.